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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 27

THE UNITED STATES OF AMERICA, PETITIONER

vs.

IRA D. CARDIFF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1952
CERTIORARI GRANTED MAY 5, 1952

No. 12945

# United States
# Court of Appeals
## for the Ninth Circuit.

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IRA D. CARDIFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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# Transcript of Record

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**Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JOHN LICHTY,

Failing Building,
Portland 4, Oregon,

Attorney for Appellant.

HARVEY ERICKSON,

U. S. Attorney, Eastern District of Washington;

FRANK R. FREEMAN,

Assistant U. S. Attorney, Eastern District of Washington;

Federal Building,
Spokane, Washington,

Attorneys for Appellee.

United States District Court for the Eastern District of Washington, Southern Division

No. C—4308

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IRA D. CARDIFF,

Defendant.

## APPLICATION FOR TRANSFER

I, Ira D. Cardiff, defendant above named, being fully advised and informed as to my rights and privileges, hereby apply for transfer of the above cause from Yakima, in the Southern Divison of the Eastern District of Washington, to Spokane in the Northern Divison of said District, for the purpose of arraignment and plea and for all further proceedings herein.

Dated this 29th day of March, 1951.

/s/ IRA D. CARDIFF,
Defendant.

Approved:

/s/ JOHN LICHTY,
Attorney for Defendant.

[Endorsed]: Filed March 30, 1951.

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[Title of District Court and Cause.]

## ORDER OF TRANSFER

This matter coming on before the Court upon ap-

plication of the defendant in his own proper person,

It Is Hereby Ordered that the above-entitled cause be, and it hereby is, transferred from Yakima, in the Southern Divison of the Eastern District of Washington, to Spokane, in the Northern Division of said District, for all further proceedings herein.

Dated this 30th day of March, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

Approved by:

/s/ HARVEY ERICKSON,
United States Attorney.

[Endorsed]: Filed March 30, 1951.

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[Title of District Court and Cause.]

## INFORMATION

Violation: Secs. 331 and 333
Title 21, USC

The United States Attorney charges:

That on or about March 31, 1950, the Washington Dehydrated Food Company, a corporation organized and existing under the laws of the State of Washington, and trading and doing business at Yakima, State of Washington, operated a factory at 709 First Avenue North, Yakima, State of Washington, in which food is manufactured, processed, packed and held for introduction into interstate commerce;

That at the time aforementioned, Ira D. Cardiff, an individual, was president of said corporation and was the operator and custodian of said factory located at Yakima, State of Washington;

That at the time aforementioned at Yakima, State of Washington, within the Southern Division of the Eastern District of Washington, Ira D. Cardiff, the defendant herein, did, in violation of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(f), unlawfully refused entry and inspection of said factory of the Washington Dehydrated Food Company, upon request duly made at a reasonable time and in accordance with the provisions of 21 U.S.C. 374 by Inspectors R. C. White and Horace A. Allen, who where then and there employees of the United States Food and Drug Administration duly designated for such purpose by the Administrator of the Federal Security Agency.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed October 23, 1950.

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[Title of District Court and Cause.]

## MOTION TO DISMISS

Comes now the defendant and moves the court to dismiss the Information filed herein upon the

ground that said Information fails to allege any facts sufficient to constitute any offense against the laws of the United States.

Dated this 26th day of October, 1950.

/s/ JOHN LICHTY,
Attorney for Defendant.

[Endorsed]: Filed October 27, 1950.

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[Title of District Court and Cause.]

SUMMONS

To: Ira D. Cardiff, 709 N. 1st Ave., Yakima, Washington.

You are hereby summoned to appear before the District Court of the United States for the Eastern District of Washington, at the Federal Building, in the city of Yakima, on the 30th day of October, 1950, at 10:00 o'clock a.m., to answer to an Information charging you with violation of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 331 and 333).

[Seal] A. A. LaFRAMBOISE,
Clerk.

By /s/ THOMAS GRANGER,
Deputy Clerk.

Issued Oct. 23, 1950.

Return on Summons acknowledged.

[Endorsed]: Filed November 1, 1950.

[Title of District Court and Cause.]

## OPINION OF THE COURT

Appearances:

HARVEY ERICKSON,
United States Attorney,
Federal Building,
Spokane, Washington.

LLOYD WIEHL,
Assistant United States Attorney,
Federal Building,
Yakima, Washington.
Attorneys for Plaintiff.

JOHN LICHTY,
Failing Building,
Portland 4, Oregon,
Attorney for Defendant.

Driver, Chief Judge.

Defendant, Ira D. Cardiff, was charged by information with violation of the Federal Food, Drug and Cosmetic Act,[1] hereinafter referred to as the Act, based on refusal of defendant to permit entry for purposes of inspection. The information alleges the following facts:

Defendant is the president of Washington Dehydrated Food Company, a Washington corporation, and the operator and custodian of a factory at Yakima, Washington, which is owned by said cor-

[1] 21 U.S.C., Sec. 301 et seq.

poration. The Yakima factory manufactures, processes, packs and holds food for introduction into interstate commerce.

On or about March 31, 1950, two inspectors of the United States Food and Drug Administration approached defendant and requested permission to enter and inspect the Yakima factory. The request was made at a reasonable time in accordance with the provisions of Section 704 of the Act (21 U.S.C. Sec. 374), by the inspectors, who were duly designated for such a purpose by the Administrator of the Federal Security Agency. The defendant refused to permit the inspectors to enter and inspect the building.

The defendant now moves to dismiss the information, contending (1) that the facts alleged charge no violation of the Act, inasmuch as the inspectors had not previously obtained consent of the corporation or its managing officer for such entry and inspection; and (2) that Congress could not constitutionally make it an offense for the owner or manager of premises to refuse permission to enter for the purpose of obtaining evidence for criminal prosecution against such owner or manager.

The relevant statutory provisions are as follows:

"Sec. 301. The following acts and the causing thereof are hereby prohibited:

* * *

"(f) The refusal to permit entry or inspection as authorized by section 704."[2]

"Sec. 704. For purposes of enforcement of

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[2] 21 U.S.C. Sec. 331(f).

this Act, officers or employees, duly designated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle, and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."[3]

"Sec. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor * * *"[4]

"The Federal Food, Drug and Cosmetic Act rests upon the constitutional power resident on Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types." U. S. vs. Walsh, 331 U. S. 432.[5]

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[3]21 U.S.C., Sec. 374.

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[4]21 U.S.C., Sec. 333(a).

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[5]See also U. S. v. Dotterweich, 320 U. S. 277, 280; U. S. v. Crescent-Kelvan Co., 3 Cir. 164 F(2d) 582;

The protection of the Fourth Amendment relative to unreasonable search and seizure is not violated by the Act. It is my opinion that the inspections must be made at reasonable times, but the right to inspect is necessary to carry out the purposes of the Act. Without it, there is no positive protection to the public.

I perceive no merit in defendant's contention, obviously based on the emphasized portions of Section 704 above, that refusal to permit entry and inspection is not punishable unless permission was first granted, or in other words, unless he granted permission and then changed his mind. The Congress had no such intention in enacting the law. What Congress did intend, I think, by providing for obtaining permission (Section 374), was an attempt to have the inspections made at reasonable times.

The constitutional questions are adequately answered in the government's supplemental brief, by analogy to the cases dealing with the production of corporate records, etc., as required by law.[6] In those cases it is made plain that the records can be subpoenaed and required even though there is no reason for issuance of a search warrant. It is, I believe, a fundamental rule that constitutional immunities

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McDermitt v. Wisconsin, 228 U. S. 115; Hipolite Egg Co. v. U. S., 220 U. S. 45; Seven cases v. U. S., 239 U. S. 510.

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[6]Fleming v. Montgomery Ward 7 Cir. 114 F(2d) 384; Bartlett-Frazier v. Hyde, 7 Cir., 65 F(2d) 350. (Certiorari denied in both).

from search are waived to a limited extent by those who engage in a business regulated by law.[7] And a corporation has not the same immunity from search as has a private individual.[8]

I have taken into consideration the fact that here the defendant is not a corporation, but a private individual. But an individual who is an officer of a corporation cannot refuse to produce books and records of the corporation on grounds that they might incriminate him. Wilson v. U. S., 221 U. S. 361. And I feel that an individual who is an officer of a corporation cannot refuse to permit entry for purposes of inspection under the Food, Drug and Cosmetic Act, if the inspection is sought to be made at a reasonable time.

Defendant's motion to dismiss the information will be denied.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed January 23, 1951.

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[Title of District Court and Cause.]

## ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter coming on for argument on the defendant's motion to dismiss the information, and

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[7]5 F. Supp. 527, 531; 56 C. J. 1180 Sec. 64.

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[8]Hale v. Henkle, 201 U. S. 43, 74-77; Wilson v. U. S., 221 U. S. 361.

the Court having heard the arguments of counsel, it is by the Court,

Ordered, Adjudged and Decreed that the defendant's motion to dismiss is denied.

Dated this 9th day of February, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ HARVEY ERICKSON,
United States Attorney.

Notice of Presentment waived:

....., Attorney for Defendant.

[Endorsed]: Filed February 9, 1951.

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[Title of District Court and Cause.]

PLEA

Now, on this 9th day of February, 1951, into court comes the defendant, Ira D. Cardiff, and waives presence of counsel, for arraignment under the Information heretofore filed against him, and being interrogated by the Court as to his plea thereto, defendant answers that he desires to enter a plea of Not Guilty, which plea is received by the Court and ordered entered on the records of the Court.

[Endorsed]: Filed February 9, 1951.

[Title of District Court and Cause.]

## WAIVER OF JURY TRIAL

I, the undersigned, Ira D. Cardiff, defendant named in the above-entitled action, do hereby waive my right to have said action tried before a jury and do consent in open court that said action may be tried to the Court without a jury.

Dated this 29th day of March, 1951.

/s/ IRA D. CARDIFF,
Defendant.

Approved:

/s/ JOHN LICHTY,
Attorney for Defendant.

[Endorsed]: Filed March 30, 1951.

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[Title of District Court and Cause.]

## STIPULATION AS TO FACTS

It is hereby stipulated by and between Harvey Erickson, United States Attorney and attorney for plaintiff, and the defendant, Ira D. Cardiff, and John Lichty, his attorney, that the following constitutes the facts in the above-entitled case.

I.

That the Washington Dehydrated Food Company is a corporation organized and existing under the laws of the State of Washington and engaged in

doing business in Yakima County, in the Southern Division of the Eastern District of Washington, and is a processor of food, which food is manufactured, packed and held for introduction into interstate commerce.

II.

That on or about March 31, 1950, and immediately before and after said date, Ira D. Cardiff, an individual, was the President of said corporation and was the operator and custodian of said factory and as an individual is responsible for the acts of said corporation.

III.

That on or about March 31, 1950, at Yakima, in the Southern Division of the Eastern District of Washington, defendant refused to permit agents of the Federal Security Agency, to wit: Inspectors R. C. White and Horace A. Allen of the Food and Drug Administration, to enter and inspect the factory of the Washington Dehydrated Food Company. That the request of said inspectors for permission to enter and inspect was made to the defendant at a reasonable time.

IV.

That the Washington Dehydrated Food Company and the defendant, as manager thereof, were at said time engaged in the preparation of food products for introduction and shipment into the channels of interstate commerce.

Dated this 29th day of March, 1951.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ IRA D. CARDIFF,
Defendant.

/s/ JOHN LICHTY,
Attorney for Defendant.

Approved March 30, 1951.
/s/ SAM M. DRIVER,
U. S. District Judge.

[Endorsed]: Filed March 30, 1951.

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[Title of District Court and Cause.]

WAIVER

I, the undersigned, the defendant in the above-entitled criminal proceeding, do hereby waive any and all right to be present in Court upon the trial of the said cause, and consent that I be represented at said trial by my attorney, John Lichty.

Dated this 29th day of March, 1951.

/s/ IRA D. CARDIFF.

State of Oregon,
County of Multnomah—ss.

Before me the undersigned, a notary public in and for the State of Oregon, this 29th day of March, 1951, personally appeared Ira D. Cardiff, to me personally known to be the person executing the foregoing waiver, who acknowledged that he executed

the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

[Seal] /s/ JOHN LICHTY,
Notary Public for Oregon.

My Commission Expires October 12, 1954.

[Endorsed]: Filed March 30, 1951.

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[Title of District Court and Cause.]

## WAIVER

I, the undersigned, the defendant in the above-entitled criminal proceeding, do hereby waive any and all right to be present in Court at the time of the imposition of sentence against me by the Court.

Dated this 4th day of April, 1951.

/s/ IRA D. CARDIFF.

State of Washington,
County of Yakima—ss.

Before Me the Undersigned, a notary public in and for the State of Washington, this 4th day of April, 1951, personally appeared Ira D. Cardiff, to me personally known to be the person executing the foregoing waiver, who acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

[Seal] /s/ ROBERT S. WILSON,
Notary Public for the State of Washington.

[Endorsed]: Filed April 9, 1951.

District Court of the United States for the Eastern District of Washington, Northern Division

No. C—8130

UNITED STATES OF AMERICA,

vs.

IRA D. CARDIFF.

## JUDGMENT AND COMMITMENT

On this 11th day of April, 1951, came the attorney for the government and the defendant having waived in writing, any and all right to be present in court at the time of the imposition of sentence.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and the finding of guilty by the Court of the offense of unlawfully refusing entry and inspection of the factory of the Washington Dehydrated Food Company in violation of Secs. 331 and 333, Title 21, U.S.C., as charged in the Information.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine to the United States of America in the sum of Three Hundred ($300.00) Dollars, and costs.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court:

Notice is hereby given that Ira D. Cardiff, defendant in the above-entitled action, whose address is 709 N. First Avenue, Yakima, Washington, by and through his attorney, John Lichty, whose address is 1225 Failing Building, Portland, Oregon, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the said action on the 11th day of April, 1951, by which said judgment the said defendant was found guilty by the Court of the offense of unlawfully refusing entry and inspection of the factory of the Washington Dehydrated Food Company in violation of Secs. 331 and 333, Title 21, U.S.C., and the further judgment of the said court, contained in the same judgment order, wherein and whereby it was adjudged that the defendant pay a fine to the United States of America in the sum of Three Hundred and 00/100 ($300.00) Dollars and costs; said judgment order being signed by Sam M. Driver, United States District Judge of the above-entitled Court.

This appeal is taken from each and every part of the said judgment.

Dated this 18th day of April, 1951.

/s/ JOHN LICHTY,
Attorney for Defendant,
Ira D. Cardiff.

Copies mailed.

[Endorsed]: Filed April 19, 1951.

United States District Court, Eastern District of Washington, Northern Division

No. C—8130

UNITED STATES OF AMERICA,

Plaintiff,

vs.

IRA D. CARDIFF, an Individual,

Defendant.

## RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Friday, March 30, 1951, before the Honorable Sam M. Driver, United States District Judge, sitting without a jury; the plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington, the defendant not being personally present, but being represented and appearing by John Lichty, attorney at law of Portland, Oregon, whereupon the following proceedings were had and done, to wit:

Mr. Erickson: Please the Court, Mr. Cardiff is not here; it's a misdemeanor charge, and Mr. Lichty is here from Portland representing him. I have here a signed application for transfer to the northern division, signed by Ira D. Cardiff, and a proposed order of transfer, and I also have a waiver of presence in court, signed by Ira D. Cardiff in writing before a notary public, and a waiver of jury trial signed by Ira D. Cardiff also.

The Court: Very well, the case will be transferred from the southern division to the northern division of the district.

Mr. Erickson: Please the court, we have agreed upon a stipulation of facts, as to the facts in this case, Mr. Lichty, in behalf of the defendant, and myself. Will I read those facts into the record, or merely file them?

The Court: If you'll just wait a moment, I'd like to look at this rule 43 on the presence of the defendant. I wish to be sure that the waiver is sufficient here to give the court jurisdiction. I don't believe that this waiver is sufficient under the rule to permit me to impose sentence in the absence of Dr. Cardiff. The practice in the absence of a rule would be to require the defendant's presence at every stage of the proceeding. Rule 43 provides "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." And further: "A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year"—that's this case, I assume—"or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." The defendant has waived the right to be present at the trial, but not at the imposition of sentence.

Mr. Lichty: Your Honor, I wonder if your

Honor could hear that, and I would get the necessary stipulation, and your Honor in his absence can impose the sentence?

The Court: I understand also you're to present this on a stipulated statement of facts?

Mr. Erickson: Yes, we have that here.

The Court: Has Dr. Cardiff agreed to that?

Mr. Erickson: Yes.

The Court: I'll hear the matter, then.

Mr. Lichty: I can amend the stipulation and file it.

The Court: I wouldn't like to have an abortive appeal in this case.

Mr Lichty: We don't want it either. In fact, we have tried every way possible in this stipulation to cover every fact.

The Court: May I see the stipulation?

Mr. Erickson: Yes.

The Court: Do you have a copy of this, Mr. Erickson?

Mr. Erickson: Yes.

The Court: I think that this should be filed as a stipulation, but also I suggest that you read it into the record so that it becomes a part of the record on appeal without any question, and can be taken up as such.

Mr. Erickson: Stipulation as to facts, United States of America, Plaintiff, vs. Ira D. Cardiff, defendant, It is hereby stipulated by and between Harvey Erickson, United States Attorney and attorney for the plaintiff, and the defendant, Ira D. Cardiff, and John Lichty, his attorney, that the fol-

lowing constitutes the facts in the above-entitled case:

That the Washington Dehydrated Food Company is a corporation organized and existing under the laws of the State of Washington and engaged in doing business in Yakima County, in the Southern Division of the Eastern District of Washington, and is a processor of food, which food is manufactured, packed and held for introduction into interstate commerce.

That on or about March 31, 1950, and immediately before and after said date, Ira D. Cardiff, an individual, was the President of said corporation and was the operator and custodian of said factory and as an individual is responsible for the acts of said corporation.

That on or about March 31, 1950, at Yakima, in the Southern Division of the Eastern District of Washington, defendant refused to permit agents of the Federal Security Agency, to wit, inspectors R. C. White and Horace A. Allen of the Food and Drug Administration, to enter and inspect the factory of the Washington Dehydrated Food Company. That the request of said inspectors for permission to enter and inspect was made to the defendant at a reasonable time.

That the Washington Dehydrated Food Company and the defendant, as manager thereof, were at said time engaged in the preparation of food products for introduction and shipment into the channels of interstate commerce.

Dated this 29th day of March, 1951, and signed by the attorneys and by the defendant.

The Court: Well, I'll approve the stipulation, and it may be received as a factual basis for the case. I assume that what is intended here is to present, in as short and inexpensive a way as possible, the question of law that the court has already decided.

Mr. Lichty: That's right your Honor.

The Court: I believe it was on demurrer or motion to dismiss the information, and the court having already passed on the question of law, I presume that you wish now my decision on your statement of facts. Do you care to argue the matter?

Mr. Lichty: I do not, your Honor; your Honor has decided it on as good an argument as I can make, and I can't add anything.

The Court: Have you anything to add, Mr. Erickson?

Mr. Erickson: No. I have nothing further to add except what is in the stipulation of facts. If the court wishes some of the background in the fixing of the fine, I'm prepared to give that.

The Court: Well, I think first what I should do is to find, and I do find, that on the agreed stipulation of facts the defendant is guilty of the offense charged in the information. Now, let's see, that's rule 43. There isn't any requirement that the attorney be present, is there, in these misdemeanor cases, if the defendant waives?

Mr. Lichty: I don't think so, your Honor.

The Court: No, I don't believe there's any requirement that the defendant's attorney be here. What I think I should do, or what I propose to do today is to hear your discussions on this matter of sentence, and indicate what my sentence tentatively will be, and then if you'll file the written consent I can pronounce the sentence when you're not present, unless you care to be.

Mr. Lichty: No, I don't care to be present; I can file the notice of appeal.

The Court: Let's see, you have ten days; I'd better fix it some definite date.

Mr. Lichty: Dr. Cardiff went to Portland yesterday on the way to San Francisco. He expects to be back in Yakima about Wednesday of next week, if the Court could fix a week from today.

The Court: I'm going to Seattle for two weeks commencing the 16th. If you can get the consent here by April 11, I'll pronounce sentence on the morning of the 11th, and you can depend on that unless you're advised to the contrary. However, I'll have the clerk notify you again.

Mr. Lichty: I find the clerk is very efficient your Honor.

The Court: All right, I'll hear you.

Mr. Erickson: Please the court, as your Honor knows, this is the first case as far as I know, as far as I am able to find out, that was contested under this statute. We do not have any contested cases under this statute, consequently an appeal is not only beneficial to the defendant in this case, but it probably will be beneficial to the Food and Drug

Administration, as well, to obtain a decision settling the law upon this point.

The statute provides a maximum penalty of $1,000 or one year in jail, or both. The record indicates in this case that about a half a dozen times since 1938 the Food and Drug inspectors have endeavored to inspect the plant of Ira D. Cardiff in Yakima, and Ira D. Cardiff has each time refused to allow them to enter the premises for inspection, contending that the statute did not permit them to inspect his premises. He is engaged in the dehydration of food and preparation of food for shipment in interstate commerce, drying mostly apples and other fruit products that are raised in the Yakima Valley, which is all shipped in interstate commerce. There has been one other decision that I am advised of lately; it happened in New York January 17, 1951. The United States District Judge there sentenced on a plea of guilty under this statute an individual and a corporation. He fined them $750.00 each, where they were charged with this among other things, one count of failure to inspect.

The Court: This is just one count, isn't it?

Mr. Erickson: Yes, there's just one count here; and in St. Louis, Missouri, a court there placed a defendant on probation for violation of the Food and Drug statute, and revoked the probation because of the fact that the plant manager or owner there refused to permit the inspection after he was placed on probation. He was placed on probation for another violation, but when the inspectors came he refused them entrance, and the fact was con-

municated to the Judge and he revoked the probation and gave him eight months to serve. That's the only history I have of previous sentences given under this statute.

Mr. Lichty: Your Houor, the background of this is rather a long one. I have represented Ira D. Cardiff since I practiced law in the Yakima Valley between 1921 and 1926. There has been a history of attempts by the Pure Food and Drug Administration to confiscate his products in interstate commerce due to a higher tolerance of spray residue than is established by departmental order, under the act which permits the government to confiscate——

The Court: I know so much about that spray residue problem that I consider myself disqualified on that matter before the court.

Mr. Lichty: ——I have three times gone all over the United States, to Chicago, to Kentucky, and to San Francisco to fight the attempted confiscation and condemnation of spray residue, and each time we have proved conclusively that the tolerance is not dangerous to human life or health, and in no case has the government prevailed in the condemnation or confiscation of Dr. Cardiff's products.

When this act came up the Doctor told me at the time and he tells me now, the first draft of the act had in it—we have section 374 here, the factory inspections under which we are charged; 373 refers to the inspections in a carrier's hands. It provides "For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices,

or cosmetics in interstate commerce or holding such articles so received, shall, upon request of an officer or employee duly designated by the Administrator, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates: Provided, that evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained."

Now, the following section, referring to factory inspection, has different language than that. It provides that the Administrator "after first making request and obtaining permission"—which is not in the preceding section; now, Dr. Cardiff has told me over the years that at the time this came up, the first draft of the Act, and the legislative history will have to be presented on appeal, and I'm getting it now, that that section on factory inspection did not require the request and obtaining of permission, but the food processors through their congressmen in committee got it amended to require the request and permission to be granted.

If that is true, then I believe the Doctor was acting under an honest belief of his rights in this

thing. The different wording of the statute is such that would lead a lawyer, myself in particular, I have consulted him—as they say, repeatedly since 1938 he has refused to permit the inspection and he has done it on my advice that in my opinion the law was such that he did not have to grant that permission, so in imposing sentence I merely want the court to bear in mind that there is nothing in this that was wilfully done in a belief that he was getting away with a violation of the Act, that he did it under advice of his attorney, and whatever crime he has committed in doing this I would have done in the same place, and advised him that he could do without being criminally liable.

There is no claim made, I don't believe, by anyone that the man is not a substantial, reputable citizen doing a good job in his industry in the valley, and I do not think that a fine of any size in this case should be assessed against him; and I think that this is a matter that should be determined and that everyone will benefit by a determination in this matter. I have already received three letters from attorneys in different parts of the county who have read your Honor's decision, being the first decision published on that thing, who are all interested in seeing the appeal prosecuted so they will know how they can advise their clients in the future.

The Court: I was just asking my legal expert here on appellate procedure. I'm not sure just what the situation is so far as your bond on appeal is concerned where there's nothing but a fine.

Mr. Lichty: The Court may make any order on

supersedeas that it sees fit. It may supersede the levy of the fine in its entirety; it may require bond to insure it. I don't think in this case that any bond will be necessary. I think the financial responsibility of the corporation and Dr. Cardiff is sufficient that the Court may supersede the payment of the fine without requiring any bond, or it even provides that they may call him in and question him as to his assets and financial responsibility, rule 36 or 37.

The Court: Well, I had considerable difficulty in deciding the motion to dismiss the information. The statute on which the prosecution is based is not at all clear. I think it's very ambiguous and I reached my conclusion on what I thought the Congress should have intended rather than what they clearly said they intended in the statute. It's a very unsatisfactory statute, and I think it's one that should be clarified by a decision of the higher Court, and I think there's justification for Dr. Cardiff's position that he thought he was within his legal rights. I'm not so sure that the Court of Appeals will reach that conclusion ultimately, because it is a close question, I think, and it isn't a case where there's been a wilfull violation of law, but rather a difference of opinion as to what the law is. However, I'm reminded of a story that appeared in "The Great Mouthpiece," I think it was, of this lawyer who had been a very successful small town jury lawyer, got a job in the city law office and they sent him out to try a case that was supposed to be a test case to decide the validity of a bond issue,

and he bought the sheriff a few drinks, met the jurors and made friends with them and won his case before the jury and came back and was severely reprimanded because he had spoiled a good test case. I was just thinking if I impose a nominal fine there would be a great temptation on the part of the defendant to call it a day.

Mr. Lichty: Have no doubts about it, we want very definitely to have this case go to the United States Supreme Court.

The Court: At any rate, to give it an appearance of substantial controversy, I had in mind a fine of $300.00, with the thought that if the conviction is sustained in the appellate court that consideration should be given to reduction of the sentence within sixty days after the mandate comes down, under rule 35. I think serious consideration should be given to a nominal amount, and if I'm not here at that time for one reason or another the minutes will be available to show that's what I had in mind in imposing sentence.

Mr. Lichty: Thank you, your Honor.

The Court: Just a moment; I think I made an adjudication of guilt under the stipulated facts, did I not? Are findings necessary in a criminal case tried before the Court?

Mr. Lichty: No. You made a finding of guilty.

The Court: And then the sentence will be entered after the waiver is filed.

Reporters Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the regularly appointed, qualified and acting official court reporter of the United States District Court for the Eastern District of Washington. That as such reporter, I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington, held on March 30, 1951, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein.

Dated this 10th day of May, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed May 10, 1951.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Wash-

ington, do hereby certify that the documents hereto annexed are the Original.

Application for transfer to Spokane.
Order for Transfer.
Information.
Criminal Summons.
Motion to Dismiss.
Opinion of the Court on Motion to Dismiss.
Order denying defendant's Motion to Dismiss.
Plea of Not Guilty.
Waiver of Jury Trial.
Stipulation as to Facts.
Waiver of presence at trial.
Court Reporter's Record of proceedings at trial.
Waiver of presence at time of imposition of sentence.
Judgment and Sentence.
Notice of Appeal.
Petition for Stay of Execution.
Order Staying Execution.

Stipulation of parties as to Record on Appeal.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the Stipulation of the Parties as to the Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court,

at Spokane, in said District, this 21st day of May, 1951.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk, U. S. District Court.

By /s/ EVA M. HARDIN,
Deputy.

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[Endorsed]; No. 12945. United States Court of Appeals for the Ninth Circuit. Ira D. Cardiff, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 23, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Circuit Court of Appeals
for the Ninth Circuit

No. 12945

IRA D. CARDIFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## APPELLANT'S STATEMENT OF POINTS

Comes now the appellant, Ira D. Cardiff, and

files and serves the following as a statement of points upon which he intends to rely.

**Point I.**

The information in this case does not state facts sufficient to constitute any offense against the laws of the United States of America, and that the court erred in overruling and denying appellant's motion to dismiss.

Point II.

That the court erred in holding that the stipulated facts in this case constituted proof of the commission of any crime of the violation by the appellant of any laws of the United States of America; the said stipulated facts having been read into the record upon the trial and the same constituting the only evidence introduced on behalf of either appellant or appellee.

Point III.

That there is no evidence to support the judgment of conviction entered by the court herein, finding the appellant guilty of the crime charged in the Information upon which he was arraigned and tried.

Dated this 28th day of May, 1951.

/s/ JOHN LICHTY,
Attorney for Appellant.

[Endorsed]: Filed May 31, 1951.

# United States Court of Appeals

FOR THE NINTH CIRCUIT

IRA D. CARDIFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 12945

**Appeal from the United States District Court for the Eastern District of Washington Northern Division**

## PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpts from Proceedings of Tuesday, February 5, 1952

Before: DENMAN, Chief Judge, ORR and POPE, Circuit Judges.

### Order of Submission

ORDERED appeal herein argued by Mr. John Lichty, counsel for appellant, and by Mr. Harvey Erickson, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 12, 1952.

Before: DENMAN, Chief Judge, ORR and POPE, Circuit Judges.

### Order Directing Filing of Opinion and Filing and Recording of Judgment

ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRA D. CARDIFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 12,945

Feb. 13, 1952

Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.

Before: DENMAN, Chief Judge, and ORR and POPE, Circuit Judges.

DENMAN, Chief Judge:

This is an appeal from a judgment convicting Cardiff of violating Section 331 (f) of 21 U.S.C. by his refusal to permit entry and inspection of the premises of the Washington Dehydrated Food Company of which Cardiff was manager.

The stipulated facts are as follows:

That the Washington Dehydrated Food Company, a corporation, is a processor of food, manufactured, packed and held for introduction into interstate commerce; that the appellant, Ira D. Cardiff, is the President of said corporation and was the operator and custodian of the factory of the Washington Dehydrated Food Company, and that as an individual he is responsible for the acts of the corporation; that on March 31, 1950, at Yakima, in the Southern Division of the Eastern District of Washington, Inspectors R. C. White and Horace A. Allen, agents of the Federal Security Agency, at a reasonable time did request permission to enter and inspect the factory, which request was refused by the appellant; that the Washington Dehydrated Food Company was at that time engaged in the preparation of food products for introduction and shipment into the channels of interstate commerce.

Cardiff contends that the district court has misconstrued the two applicable sections of the Food and Drug Act, 21 U.S.C. 331 (f) and 374. Section 331, for the violation of which the punishment is provided in Section 333, states in subdivision (f):

> "The following acts and the causing thereof are hereby prohibited: . . . (f) the refusal to permit entry or inspection as authorized by Section 374."

The authorization in Section 374 is for entries at reasonable times (plural) and inspections also at such times. Such authorization is obtained only from a permission by the operator or custodian of the factory given pursuant to the request of the Food and Drug Administrator. Section 374 provides:

"For the purposes of enforcement of this chapter, officers or employees duly designated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. June 25, 1938, c. 675, Sec. 704, 52 Stat. 1057; Reorg. Plan No. IV, Sec. 12, eff. June 30, 1940, 5 Fed. Reg. 2422, 54 Stat. 1237."

Section 331 (f) and Section 333 constitute penal legislation making the first offense a misdemeanor and a second offense a felony.[1] Obviously these statutes will not have one interpretation where the offense charged is a misdemeanor and another on where the charge is a felony. Here there are none of the gossamer-like refinements of interpretations referred to in Pasadena Research Laboratories v. United States, 169 F. 2d 375, 379 (Cir. 9). The statutes must be construed as creating a felony for their violation. Hence in construing this penal legislation, it is elemental that if it be subject to two rational interpretations, we must accept that favorable to the accused. We think that Cardiff in refusing to grant the permission for successive inspections did not violate the statute so construed.

The permission which may be authorized by Section 374 is for repeated inspections at the "reasonable times" for which the section provides. Obviously the inspector is not required to obtain permission for each inspection. It was agreed at the hearing that Cardiff's plant is engaged in processing apples into boxes for shipping in carload lots into interstate commerce and that the apples are the product of different orchards. Most orchardists use a spray on the growing apples to resist insect infestation or other deterioration. This spray contains chemicals remaining on the apples which from certain orchards is in sufficient quantity to be deleterious to the

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[1] "§ 333. Penalties—Violations of section 331.

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine or not more than $10,000, or both such imprisonment and fine."

health of the consumer, while from other orchards there is no spraying or the remaining spray is not sufficient to be injurious. The apples with the excessive spray require a costly treatment to be made safely edible.

Assume Cardiff, who has "authorized [inspection] by section 374," finds that the apples from so many orchards require this costly treatment that his season's operation will be at a loss and he therefore refuses to permit any more of the inspections, which he had authorized under 374. So doing he would commit a misdemeanor for the first refusal and upon final conviction thereof, a second refusal is a felony.

We do not agree with the government's construction of the two sections that while under 374 the inspector is to make entries and inspection *only* after requesting *and obtaining* permission of the owner, operator, or custodian, section 331 (f) makes it a crime if the inspector's request is refused. That is to say, Congress by section 374 (f) gives the operator the right to refuse inspection and section 331 (f) warns him that if the exercises the right so given him he is liable to imprisonment. It is true that "the Lord giveth and the Lord taketh away" in a manner seemingly unjust to the mind of man, but here we are considering an act of Congress.

Such a roundabout and unreasonable construction makes an absurdity of the requirement of the inspector of "obtaining permission." It would make nugatory instead of giving effect to the words, "after first making request and obtaining permission," etc. There is no merit to the contention of the government that these words do no more than provide for reasonable times for inspection, for section 374 would provide for this if the phrase were omitted. Congress if it desired to secure the inspections without obtaining permission would have done so in the manner of the preceding section 373 of the same Act.[2] There interstate carriers of foods and drugs "*shall*, upon the [mere] request of . . . [the inspector]," permit "access to . . . records showing the movement in interstate commerce" of their products.

Even assuming that the government's interpretations of this legislation creating a felony were not absurd and unreasonable the interpretation we have given is also a reasonable one, and being the one more favorable to the accused must control.

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2 "§ 373. Records of interstate shipment.

For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Administrator, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement,

The able district judge stated his doubt of the government's interpretation as follows:

> "Well, I had considerable difficulty in deciding the motion to dismiss the information. The statute on which the prosecution is based is not at all clear. I think it's very ambiguous and I reached my conclusion on what I thought the Congress should have intended rather than what they clearly said they intended in the statute. It's a very unsatisfactory statute, and I think it's one that should be clarified by a decision of the higher Court, and I think there is justification for Dr. Cardiff's position that he thought he was within his legal rights."

He had denied the defendant's motion to dismiss from which the government could have taken the appeal he thought needed. Instead of jailing Cardiff he imposed a small fine, thus enabling the case to be appealed here instead of granting an unappealable acquittal.

The government's brief gives an extended review of the food and drug legislation and makes a strong argument for the need for public protection of the power to inspect food plants without permission of the owner, and states that without that power, enforcement of the law will be hamstrung. The language of Mr. Justice Brandeis in United States v. Weitzel, 246 U.S. 533, is peculiarly applicable to this contention. There the court had for consideration the interpretation of a statute providing certain penalties against "every president, director, cashier, teller, clerk or agent" of a national bank who committed certain offenses. The receiver of a national bank appointed by the controller of currency, was being prosecuted under that statute and it was necessary to interpret this statute and determine whether or not such a receiver fell within the meaning of the word "agent." In construing the statute as not covering the receiver, Justice Brandeis says at page 542:

> "It is urged by the Government that punishment of the defalcation by a receiver is clearly within the reason of the statute, and that, unless the term 'agent' be construed as including receivers, there was no Federal statute under which an embezzling receiver of a National bank could be prosecuted

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and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates; . . ."

> * * * *Statutes creating and defining crimes are not to be extended by intendment because the court and the legislature should have made them more comprehensive.*" (Emphasis supplied.)

The Food Administrator's remedy for the efficient enforcement of the law's protective provisions is the amendment of section 374 to correspond with the plain provision of 373. The judgment is reversed and the district court instructed to enter a judgment of acquittal of the defendant.

POPE, C. J., concurring:

The majority's able opinion makes an effort to read some meaning into this statute and states that in a certain hypothetical case, not like the one before us, a person might be guilty of an offense under this section. I am not prepared, and I do not think it wise, to express an opinion upon this supposititious case. I think that this statute, as written, is just plain nonsense, and because it is not the function of a court to rewrite such language, the judgment must be reversed.

(Endorsed:) Opinion and Concurring Opinion. Filed Feb. 13, 1952. PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRA D. CARDIFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 12945.

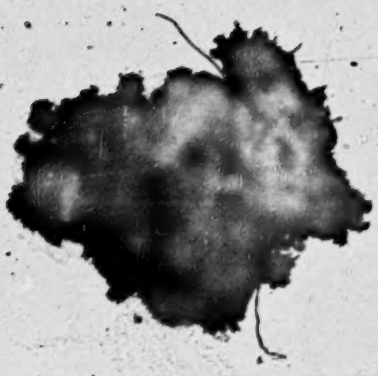
## Judgment

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and the said cause be, and hereby is remanded to the said District Court with instructions to enter a judgment of acquittal of the defendant.

(ENDORSED) Judgment
Filed and entered February 13, 1952,
PAUL P. O'BRIEN, Clerk.



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRA D. CARDIFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 12945.

**Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 38 of the Revised Rules of the Supreme Court of the United States.**

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-three (43) pages, numbered from and including 1 to and including 43, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Honorable Philip B. Perlman, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this fifth day of March, 1952.

SEAL

/s/ PAUL P. O'BRIEN
PAUL P. O'BRIEN; *Clerk*.

Supreme Court of the United States

OCTOBER TERM, 1951

No. 652

[Title omitted.]

*Order allowing certiorari*

Filed May 5, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.